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No. 87-1693

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD J. KNIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

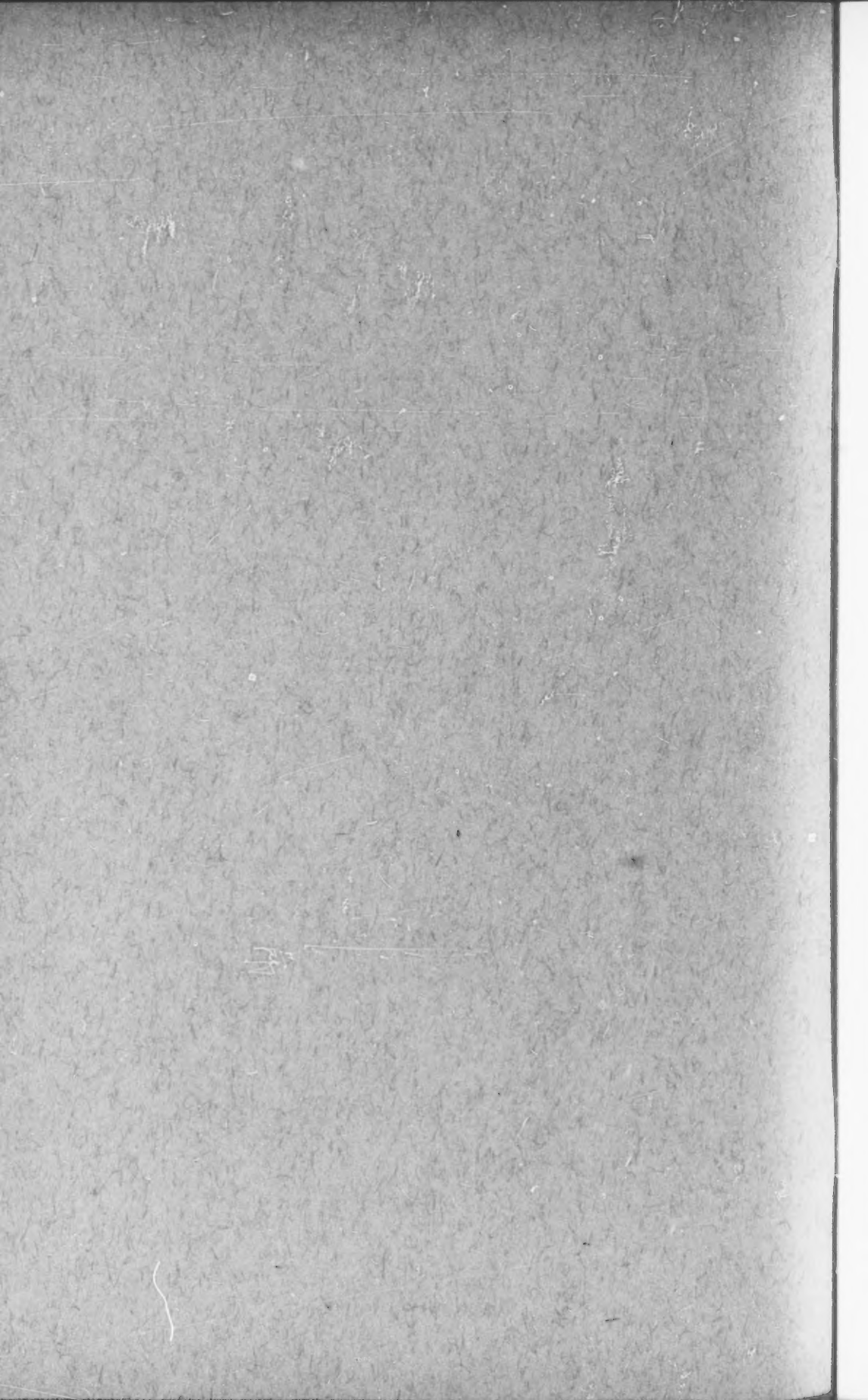
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QUESTION PRESENTED

Whether extortion "under color of official right" under the Hobbs Act, 18 U.S.C. 1951, requires the government to prove that the defendant "induced" the offer of the property that he received.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 837 F.2d 1404.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1987. A petition for rehearing was denied on February 8, 1988 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on April 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and on two counts of extortion, in viola-

tion of the Hobbs Act, 18 U.S.C. 1951.¹ He was sentenced to concurrent terms of imprisonment of 24 months. The court of appeals affirmed (Pet. App. 1a-39a).

1. In order to perform work in Chicago, sewer contractors must pay a fee to the city to obtain work permits. Prior to beginning a job, a contractor must contact the Department of Sewers and report the type, location, and price of the work. That information is then relayed to a central desk for assignment to a sewer inspector. The inspector then travels to the jobsite to check the contractor's work, handle citizen complaints, and accept the check or money order for the permit fee. Inspectors are not entitled to receive from a contractor any payment other than the permit fee, and after accepting the fee the inspector must return it to the permit desk by inter-office mail. Pet. App. 2a-3a.

Petitioner, one of 8 defendants at trial, was an inspector for the Department of Sewers. The evidence showed that petitioner and his co-defendants received, as a matter of course, fees above and beyond the permit fees, in amounts between \$10 and \$20 per inspection, and that petitioner and his confederates kept those additional fees. The government contended that this system was the product of a conspiracy among the sewer inspectors and that the receipt of the additional payments constituted acts of extortion. At trial, most of the defendants claimed that the payments were a longstanding industry tradition and represented mere gratuities, not acts of extortion. Petitioner, however, claimed that he had never received any such payments at all.

In setting forth the elements of extortion "under color of official right" under 18 U.S.C. 1951, the trial court in-

¹ Petitioner was acquitted on one count alleging a racketeering conspiracy, in violation of 18 U.S.C. 1962(d).

structed the jury, in pertinent part, as follows (Gov't C.A. Br. 92):

Extortion under color of official right means the obtaining of money by a public employee through wrongful use of his office when the money obtained was not lawfully due and owing to him or to the office which the public employee represented. It does not matter whether the public employee obtained or received the payment to perform his duties or not to perform his duties. Extortion under color of official right does not require proof of specific acts by the public employee demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the employee who obtained the money.

If the public employee knows the motivation of the victim focuses on the public employee's office and money is obtained by the public employee which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.

2. The court of appeals affirmed (Pet. App. 1a-39a). Citing prior Seventh Circuit decisions, the court rejected (*id.* at 30a-33a) the contention that extortion "under color of official right" required the jury to find that petitioner affirmatively induced the payments. The court stated (*id.* at 32a (citation omitted)) that the Second Circuit, in *United States v. O'Grady*, 742 F.2d 682 (1984) (en banc), had "taken a different view" on this issue, but it explained that "there is 'an air of the academic about this intercircuit conflict'" (Pet. App. 32a (citation omitted)). In particular, the court noted, "in this case, while we have not required that affirmative inducement be proven as a distinct

element of the offense, the evidence of record certainly establishes that the defendants received these payments because the industry well understood that, if the payments were not made, doing business would become very difficult. The money was paid out of fear that nonpayment would result in injury from the abuse of public power — and everyone, including the recipients, well understood that ‘given’ ” (*ibid.*).²

ARGUMENT

Petitioner contends (Pet. 5-10) that the decision of the court of appeals — refusing to require proof of affirmative inducement as an element of a Hobbs Act violation — is in conflict with the Second Circuit’s decision in the *O’Grady* case. Although the court of appeals in *O’Grady* required slightly different jury instructions from those used here, the substance of the offense as defined by the Second Circuit is not materially different from that accepted by the court of appeals in this case. Moreover, the evidence here would satisfy the requirements established in *O’Grady*. Further review is accordingly unwarranted.

The Hobbs Act proscribes “the obtaining of property from another, with his consent, * * * under color of offi-

² The court also held that the indictment sufficiently charged a conspiracy, that the defendants were properly joined, that certain co-conspirator statements were correctly admitted, that a notebook memorializing several of the payments was correctly admitted, that violations of the Illinois official misconduct statute were properly charged as RICO predicate acts, that the trial court had correctly instructed the jury on the elements of a RICO violation and the elements of bribery under Illinois law, that the evidence was not insufficient, that there was no prosecutorial misconduct, and that the trial court did not err in refusing to furnish the jury during its deliberations with a transcript of the trial proceedings. Pet. App. 6a-30a, 33a-39a. The petition does not present any of those issues.

cial right." 18 U.S.C. 1951(b)(2). Construing that language in the *O'Grady* case, the Second Circuit held that a defendant must "misuse[] his office to obtain benefits not due him" in order to violate the Hobbs Act (742 F.2d at 693). The court of appeals emphasized in *O'Grady* that "the government is not required to prove that the public official demanded or directly solicited the benefits received, or that he offered a specific *quid pro quo* in exchange for the benefits" (*id.* at 688-689). Instead, the government need only show that "the power of public office was misused in such a way as to induce the giving of benefits" (*id.* at 689). The court recognized that "inducement can take many forms, some more subtle than others. Proof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a *quid pro quo* would suffice * * *" (*id.* at 691). And in a concurring opinion joined by a majority of the judges, the Second Circuit also held that inducement may be inferred from "repeated acceptances over a period of time of substantial benefits" (*id.* at 694 (Pierce, J., concurring)). See also *United States v. Campo*, 774 F.2d 566 (2d Cir. 1985).

In the present case, the trial court expressly instructed the jury that "[e]xtortion under color of official right means the obtaining of money by a public employee through wrongful use of his office" (Gov't C.A. Br. 92). While the district court's instructions differed in other respects from the formulation approved by the Second Circuit in *O'Grady*, it is clear, as the court of appeals concluded (Pet. App. 32a), that petitioner's conduct satisfied the key requirement established in *O'Grady* of a misuse of public office. As the court of appeals observed (*ibid.*), the evidence at trial "certainly establish[ed] that the defendants received the[] payments because the industry well understood that, if the payments were not made, doing

business would become very difficult.” The Second Circuit in *O’Grady* cited nearly identical facts as evidence of “conduct from which inducement can readily be inferred” (742 F.2d at 689, citing *United States v. Price*, 617 F.2d 455, 458 (7th Cir. 1979)). Notwithstanding differences concerning the formulation of the governing standard, it is clear that the Second Circuit would reach the same result as did the court below on this set of facts.³

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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³ This Court has consistently denied certiorari in Hobbs Act cases arising in circuits that, like the Seventh, have approved somewhat different formulations of the proper jury instructions where an official is charged with extortion under color of official right. See, e.g., *Paschall v. United States*, 475 U.S. 1119 (1986); *McClelland v. United States*, 472 U.S. 1010 (1985); *Swift v. United States*, 469 U.S. 1158 (1985); *Jannotti v. United States*, 469 U.S. 880 (1984). See also *Kenner v. United States*, 474 U.S. 980 (1985). There is no reason for a different result here.

